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Public Funding of Private and Denominational Schools in Canada

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In November 1999, the United Nations Human Rights Committee ruled that Ontario's policy of funding Roman Catholic schools but not funding other private denominational schools is discriminatory.

This paper examines the funding of private and denominational schools across Canada, the limited constitutional protection of funding of denominational schools, the nature of public policy on this issue in the United States, and the significance of the UN ruling.

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INTRODUCTION

Since Confederation, the status and funding of denominational schools has been a contentious issue in Ontario and other provinces. Most recently, a decision by the Human Rights Committee of the United Nations brought this issue back into the spotlight in Ontario and gave fresh impetus to those groups lobbying for an extension of funding from Roman Catholic schools to all denominational schools.

At the same time, where denominational schools are publicly funded in Canada, this is not by virtue of them being denominational, but because these schools satisfy the criteria by which the jurisdiction funds private schools (denominational or not). Since the constitutional amendments in the late 1990s that permitted changes to the school systems in Newfoundland and Quebec, the only denominational schools receiving public funds *as* denominational schools have been constitutionally-protected separate (normally Roman Catholic) schools.

THE CONSTITUTIONAL STATUS OF DENOMINATIONAL SCHOOLS

The roots of this issue in Canada can be traced to the provisions in the British North America Act (1867) intended to protect the rights enjoyed by religious (and linguistic) minorities within the colonies. Section 93, which gives provinces exclusive power over education, also preserves denominational school rights existing at the time of Confederation in subsection (1):

> Nothing in any such law [i.e. with respect to education] shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union.

Leading constitutional expert Peter Hogg notes that Section 93 applied to the four original provinces, and to British Columbia and Prince Edward Island, and that similar versions were "were negotiated upon the creation or admission of the remaining provinces."[1] Among its other effects, Section 93(1) entrenched Roman Catholic schools in Ontario and Protestant schools in Quebec.[2]

Significantly, the law sought only to protect existing denominational school rights, not denominational school rights *per se*; nor did it contemplate the extension of the protection of denominational school rights after Confederation. On the other hand, there is nothing in Section 93 which prevents provinces from extending denominational school rights to other classes of persons.[3]

More recently, policies with respect to denominational schools have been challenged on the basis that they violate the *Charter of Rights and Freedoms*, most usually Sections 2 (Fundamental Freedoms) and 15 (Equality Rights). In the *Ontario Separate School Funding Reference* (1987), the extension of full public funding for Roman Catholic secondary schools was challenged on the basis that it discriminated on the basis of religion and offended Section 15 of the *Charter*. The Supreme Court upheld the funding statute, just as in 1996, in *Adler v. Ontario*, it found that the province has no obligation under the *Charter* to f und private religious schools (see N-10, **Funding of Private Religious Schools: Adler v. Ontario** by Research Officer Susan Swift, January 1997).

THE UNITED NATIONS HUMAN RIGHTS COMMITTEE DECISION

In 1996, Mr. Arieh Waldman, a Jewish parent with two children in private school, appealed to the United Nations Human Rights Committee, arguing that the school funding policy of the government of Ontario violates the International Covenant on Civil and Political Rights, to which Canada is a signatory. On 3 November 1999, the Committee issued its report, finding that there has been a violation of Mr. Waldman's rights "under article 26 of the Covenant to equal and effective protection against discrimination."[4] The Committee also noted that the State party [Canada] "is under the obligation to provide an effective remedy, that will eliminate this discrimination."[5]

The effective remedies implied by the Committee's ruling would be to implement full public funding of all denominational schools in Ontario, or to eliminate public funding of Roman Catholic schools in the province. The latter would require a constitutional amendment, and for quite separate political reasons, is probably not feasible. The former remedy—to extend funding to all denominational schools is unattractive to the government for two reasons. It is estimated that full funding of denominational

schools in Ontario would cost an additional $300 to $700 million per year.[6] The Education Minister, the Premier, and Ministry of Education spokespersons are also on record as affirming the province's commitment to a public system that is accessible and open to all (the implication being that full denominational school funding would lead to a fragmented, inconsistent system of sectarian boards). Minister Ecker's statement in response to the UN ruling was as follows:

> Ontario has just learned about the United Nations Human Rights Committee decision. The Ontario government is committed to providing an excellent public education system, that is open to all students regardless of religious or cultural backgrounds. We remain committed to the existing publicly funded education system. The Ontario government will continue to uphold its constitutional obligations and fund public and separate schools fully.[7]

In the wake of the UN Committee's ruling, there has been much discussion about just how discriminatory Ontario's funding policy is or is not, especially within the broader Canadian context. The next section explores denominational school funding policy in other provinces.

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DENOMINATIONAL SCHOOL FUNDING IN CANADA

Overview

There are two bases on which comparison of denominational school funding policy in Canada must proceed. The first is to note which jurisdictions provide public funding for a separate school system, that is, a parallel (usually but not necessarily Roman Catholic) school system established by law receiving funding equivalent or comparable to that received by public non-denominational schools. The second is to note which jurisdictions provide public funding to private or independent schools that may (or may not) be denominational schools. Without examining specifics, Table 1 provides an overview of the jurisdictional realities.

Table 1
Overview of Denominational School Funding
By Jurisdiction

Province	Separate School System	Funds Independent Schools
British Columbia	No	Yes
Alberta	Yes	Yes
Saskatchewan	Yes	Yes
Manitoba	No	Yes
Ontario	Yes	No
Quebec	Yes	Yes
New Brunswick	No	No
Nova Scotia	No	No*
Prince Edward Island	No	No*
Newfoundland	No	No

*Minor exceptions explained below.

As Table 1 indicates, there is a wide range of situations in the country. Three jurisdictions may be seen as most supportive of denominational schools, funding both a separate system and independent schools (Alberta, Saskatchewan, and Quebec). At the other extreme, the four Atlantic provinces now provide funding to neither, although this is a very recent development in Newfoundland (which previously had a system of denominational school boards). Two provinces do not have a separate school system but fund independent (including denominational) schools: British Columbia and Manitoba.

Of all the provinces, Ontario is unique in supporting a separate Roman Catholic system while not providing public funding for independent (or private) schools. This may be what has generated the comment in the media that "Ontario is the only province in Canada not to fund religious schools in some form." As the overview indicates, and the details will confirm, this is not accurate. First, it is obvious that in funding a Roman Catholic school system, Ontario *does* fund "religious schools in some form."[8] It does not fund private or independent schools (which may also happen to be denominational). Several other provinces do not fund independent schools, *and* do not fund a separate schools system; these are the provinces which do not "fund religious schools in some form."

In addition, it is often overlooked that the only religious schools which are funded *as* religious schools are those which are part of a recognized and constitutionally protected separate (Roman Catholic or Protestant) school system. Other religious schools which receive funding do so as a result of the jurisdiction's policy towards independent schools (which may or may not be denominational); no province funds non-Roman Catholic schools *as religious schools*. Moreover, and again generally, all religious schools that are funded as independent schools receive a fraction of the funding that public (or separate) schools receive.

If Ontario were to respond to the UN Committee's report by extending funding to all denominational schools on the basis of their religious affiliation or mission, it would be doing something no other province currently does. An examination of the specifics of each province's policy toward independent schools will make this clearer.

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British Columbia

British Columbia's public school system is non-denominational. All other types of schools (including Roman Catholic and other religion-based schools) operate as independent schools and are subject to the *Independent Schools Act*. The province has four categories of independent schools, only two of which receive public funding:

- Category 1 – schools that follow the provincial curriculum, employ certified teachers and comply with other aspects of provincial regulation. These receive per-student operating grants of 50% of the adjusted public school rate for their local district. The vast majority of independent schools, including Roman Catholic schools, are in this category.
- Category 2 – schools meeting the criteria of category 1 but whose operating costs exceed those of the local district public schools. As a result they are eligible to receive only 35% of the adjusted public school rate for the local district.
- Category 3 – schools that need not have certified teachers and are not evaluated by the province. Many of these schools are religion-based. They receive no public funding.
- Category 4 – schools serving mainly foreign and out-of-province students, which must meet the category 1 conditions to be able to offer the British Columbia certificate. These schools receive no public funding.

As of February 1998, B.C. had 297 independent schools with 50,200 students, sharing $133 million in provincial funding (approximately $2,469 per pupil). Another 8,000 students were attending unfunded schools. In total, just over 8% of B.C.'s pupils attend independent schools. The 1999-00 B.C. *Estimates*

show an allocation for independent schools of $140.7 million out of a total elementary and secondary allocation of $3,644 million.

In short, religious schools in British Columbia tend either to be funded at 50% of the public school rate, or fall within a category of schools that receive no public funding.

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Alberta

Alberta has one of the country's most generously funded private school sectors, in addition to a school system comprised of public and separate school boards, *and* the country's only set of charter schools.[9] In 1998-99, there were 309 private schools in operation, serving 26,454 students (4.5% of the provincial enrolment of 581,723).

All private schools must be either "registered" or "accredited." Registered schools are monitored by the provincial education ministry, and are ineligible for public funding. Many of the 26 registered private schools operate in religious, especially Mennonite, communities.[10]

Private schools seeking 'accreditation' must conform to provincial education regulations in several areas. Accredited private schools receive instructional funding at about 60% of the province's per pupil instructional grant for public and separate schools. For 2000-01, the private school instruction grant is $2,187 per pupil. Private schools also receive funding at full rate for the special education needs of students with severe disabilities ($11,948 per student). They do not receive funding for administration, transportation, operation and maintenance of schools, or capital funding for new schools or for renovating old schools. Unlike public schools, they are ineligible to receive education property taxes.[11]

In short, in Alberta, some denominational schools receive no public funding, while others are funded as independent schools at about 60% of the rate at which public schools are funded.

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Saskatchewan

Saskatchewan's publicly funded school system is comprised of Roman Catholic and public schools; all other schools operate as independent schools.

There are four categories of independent schools in the province, only two of which receive public funding:

- Registered independent schools. At a minimum, all independent schools in the province must be registered, which requires them to meet basic conditions such as health, safety, and construction standards. They receive no public funding.
- Accredited independent schools. These schools must adhere to provincial curriculum and staff standards and education goals, but receive no public funding.
- Historical high schools. Because of the early development of high schools in the province, eight private high schools (3 Roman Catholic, 2 Lutheran, 1 Mennonite, 1 Protestant, and 1 French) continue to receive public funding. Per-pupil grants equal about two-thirds of the per-pupil rate for public high schools. These schools must conform to provincial standards and goals.
- Alternative independent schools. These schools provide special needs education, and receive public funding calculated on the severity of students' special needs.

In addition, since 1993, accredited independent schools have been allowed to form operating associations with school divisions in the public school system and, as a consequence, are eligible for funding similar to that of public schools. In 1999, there were four such Associate schools operating in the province.

In 1999-00, 3,533 students were enrolled in 52 registered independent schools.

In short, in Saskatchewan, some denominational schools are funded for historical reasons, some are funded as independent schools at a reduced rate, and others remain unfunded.

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Manitoba

Manitoba has a non-denominational public school system. There are approximately 100 independent schools in the province, 54 of which are publicly funded.[12] The choice to be funded is voluntary on the part of each school, but is dependent on conformity to provincial education standards and goals.

Independent schools that meet these conditions are eligible to receive a grant of 50% of the net operating expenses per-student for public schools. This amount for 1999-00 is $2,875 per eligible pupil.

In short, in Manitoba, religious schools may be funded as independent schools at a reduced rate.

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Quebec

Quebec's public school system was originally organized on a confessional basis, with Protestant schools receiving the same constitutional protection that Roman Catholic schools enjoy in Ontario. Recently, following a constitutional amendment affecting Quebec only, the system was reorganized on linguistic grounds, but includes 'confessional' schools within either system. There is also an extensive private school system.

Every private school must obtain a provincially issued permit to operate. Beyond this, private schools may seek the accreditation required in order to receive public funding. As in other jurisdictions, accreditation involves a greater degree of conformity to the province's education objectives, policies and compliance with statutory conditions regarding curriculum, staffing and administration. The amount of funding is about 60% of the rate for public schools.

The 1999-00 *Estimates* show an increase in the allocation for private schools from $266 million to $272 million. The total enrolment in private schools for 1998-99, including pre-schoolers, was 102,814.

In short, in Quebec, Protestant and Roman Catholic schools are funded as a carryover from the original system of religious school boards, and other religious schools may be funded as accredited private schools at a reduced rate.

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New Brunswick

New Brunswick funds only its public non-denominational school system. Private schools (and therefore denominational schools) in the province do not receive public funding.

Nova Scotia

The province has a non-sectarian, publicly funded school system. Private schools do not receive public funding, with the exception of four private high schools which continue, for historical reasons, to receive a per-student grant of $400 for grade 12 students. In addition, private schools that follow the provincial curriculum are eligible for a textbook purchase subsidy.

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Ontario

As noted, Ontario has a fully funded separate (Roman Catholic) school system, but does not provide public funds to independent schools. The private school sector in Ontario has grown from 492 schools with 63,773 students in 1988-89, to 705 schools with 90,600 students in 1998-99.[13] This represents an increase from 3.24% to 4.17% in the private school proportion of Ontario's elementary and secondary enrolment.

Prince Edward Island

Prince Edward Island operates a non-denominational public school system. It does not provide public funding for private (including denominational) schools. However, the province's private schools receive free textbooks in the same manner as schools in the public system.

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Newfoundland

The school system in Newfoundland underwent two significant reforms in the 1990s. Prior to 1995, publicly funded schools in Newfoundland were operated by four separate denominational systems: the Integrated (Anglican, Presbyterian, Salvation Army and Anglican), Pentecostal, Roman Catholic and Seventh Day Adventist boards. Following a plebiscite in 1995, a new system was established, taking effect in 1997, under which all schools in the publicly funded school system were either "interdenominational" or uni-denominational, the latter existing where sufficient parental preference in a particular area supported such a designation.[14] This system proved unworkable, and after a plebiscite in 1997, provincial legislation, and a constitutional amendment, a new system has been put in place (beginning in the 1998-99 school year) consisting of non-denominational schools, in which non-denominational religious education and observances will be permitted, as parents choose.

Private schools in the province receive no public funding.

In short, Newfoundland has gone, in a very short time, from being a province where virtually all publicly funded schools were denominational, to one where no religious schools receive public funds.

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The Territories

The Yukon has a publicly funded school system comprised of non-denominational and Roman Catholic schools; private schools receive no public funding.

In the Northwest Territories, prior to 1996, only the public school system, comprised of public and Roman Catholic separate schools, received public funding. With the enactment of a new *Education Act*, private schools are eligible to receive public funding at a rate of 40% of the local district per student rate. Currently, one private denominational school operates in Yellowknife.

Under the *Nunavut Act*, all laws in force in the Northwest Territories at the time that Nunavut was created remain in force until amended by the Nunavut Legislature. To date, the policy regarding private schools has not been amended.

In short, in the Territories, denominational schools are either separate schools, funded as independent schools at a reduced rate, or remain unfunded.

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RESPONSE TO THE UNITED NATIONS COMMITTEE RULING

Although the United Nations Human Rights Committee ruling concerned Ontario's education funding policy, the onus for a response fell upon the federal government, as the signatory to the International Covenant on Civil and Political Rights. Canada was given 90 days to reply to the UN body, during which time the federal government reportedly urged Ontario to find a remedy that would satisfy the Committee.[15] The Ontario government remained adamant that it found no reason to change its policy on funding denominational schools.

On 3 February 2000, the Canadian government indicated to the UN High Commissioner on Human Rights that it was not responsible for matters falling within the constitutional jurisdiction of the provinces: "... within Canada, decisions regarding education are ultimately for the provinces to resolve in accordance with their constitutional authority."[16]

There is no mechanism by which the UN can further enforce its ruling against Canada or Ontario; the only penalty will be whatever blemish the ruling and the refusal to make remedy place on Canada's international reputation. It has been noted that Spain, Australia and Austria are also liberal democracies that have been cited for violations of the Covenant in the past few years and have not changed their policies.[17]

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PRIVATE SCHOOL FUNDING IN THE UNITED STATES

At first glance, the relevance of American experience in this area may not seem clear, given constitutional restrictions (the First and Fourteenth Amendments) which eliminate the possibility of the direct public funding of denominational schools. All denominational or 'parochial' schools—Catholic, Jewish, Lutheran, etc.—are necessarily private schools, funded through tuition, private donations, etc.

In recent years, though, an education reform movement in the United States has seen the widespread introduction of voucher and tax credit systems which give parents the opportunity to choose the school their children will attend, and to allocate the public education funding to which they are entitled to that school of their choosing. A 1999 report from the Fraser Institute, entitled **The Case for School Choice**, examines alternative models of private education in Denmark, New Zealand, Sweden, and the United States.

In the wake of the UN decision, there were some calls in the Canadian media for consideration of a voucher system as one means of providing 'non-discriminatory' funding of denominational schools.[18] This too, would require a rather significant change to the Ontario education system, and if the American experience is any guide, one that would surely be controversial. In the U.S., application of tax credits or vouchers to parochial schools has been challenged in the courts as violating the First Amendment. The Wisconsin Supreme Court and the Ohio Supreme Court upheld the constitutionality of local voucher programs in Milwaukee and Cleveland, respectively, each challenged on the basis of their direction of public dollars to parochial schools. In December 1999, the U.S. federal court struck down Ohio's 4-year voucher program for violating the constitutional separation of church and state, and courts in Vermont, Maine, and Pennsylvania have also recently struck down voucher programs that included denominational schools. To date, the U.S. Supreme Court has refused to hear any appeals of state level decisions on voucher cases.[19]

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CONCLUSION

The public funding of denominational schools in Canada comes about in one of two ways; through the established separate schools systems (Roman Catholic or Protestant) in the provinces, or through the funding of independent (private) schools. In the former case, the existence of separate school systems is often an historical artifact of the political and social realities in Canada's past. In the latter case, denominational schools are never funded *as denominational schools*, but as independent schools. Where independent schools are funded, it is always at a lower rate than the funding allocated to public and

separate schools, and to qualify for that funding they must be accredited in conformity with Ministry of Education regulations. In some jurisdictions, private denominational schools fail (or choose not) to meet the standards of accreditation that would entitle them to public funding.

At the same time, in half of Canada's provinces and in one territory, there is no public funding of private or independent schools, and thus no funding of denominational schools other than those which are part of an established separate school system.

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NOTES

[1] Peter W. Hogg, *Constitutional Law of Canada*, 4th edition. (Carswell: Toronto, 1997), p. 54-3.

[2] Clarifying the extent of the protection that section 93(1) confers upon denominational schools, Hogg notes that

> The protected rights and privileges are defined by a number of phrases in the section. The phrase "with respect to denominational schools" confines the protection to denominational schools; provincial power over non-denominational schools is quite unlimited. Even with respect to denominational schools, the protection does not extend to aspects of the curriculum that have no denominational significance. The phrase "any class of persons" means a class of persons "determined according to religious belief, and not according to race or language;" in other words, the only protected rights are those possessed by the entire class of Roman Catholics or Protestants. The phrase "by law" means that only rights and privileges established by statute are entitled to protection. The phrase "at the union" means that only rights and privileges in existence at confederation (or admission to Canada) are entitled to protection; rights and privileges created subsequently do not qualify. (Ibid., p. 54-5)

[3] Justice Iacobucci wrote in *Adler* v. *Ontario* that "Nothing in these reasons should be taken to mean that the province's legislative power is limited to these two school systems. In other words, the province could, if it so chose, pass legislation extending funding to denominational schools other than Roman Catholic schools without infringing the rights guaranteed to Roman Catholic separate schools under s. 93(1)." *Adler* v. *Ontario* [1996] 3 S.C.R. 609.

[4] United Nations. Human Rights Committee, 67th Session: Communication No. 694/1996. p. 13.

[5] Ibid.

[6] Richard Brennan, "No cash for religious schools, Harris says." *Toronto Star*, 19 January 2000, A9.

[7] Ontario Ministry of Education, News Release, 'Open Statement from the Honourable Janet Ecker, Minister of Education.' (The Ministry: Toronto, November 5, 1999).

[8] Canadian Press, "Harris says no to Ottawa request; Funding non-Catholic religious schools would dilute system, premier says," *Kitchener-Waterloo Record*, 19 January 2000, A3. Note: this story was picked up and run in slightly altered versions in newspapers across the province.

[9] See also B. Gardner, T. Glen, and L. Johnston, **Charter Schools**, Current Issue Paper 192, revised January 1999.

[10] Alberta, Private Schools Funding Task Force (Ron Stevens, Chair), *Funding Private Schools in Alberta. Part I: Setting the Stage for Discussion* (The Task Force, 1997), p. 7.

[11] Ibid., p. 10.

[12] Manitoba, Department of Education and Training, *Annual Report 1997-98*, p. 43.

[13] Ontario Ministry of Education, *Key Statistics*, various years.

[14] Newfoundland, Department of Education and Training, "Education Reform: Highlights of Proposed Legislation," *Background Information*, 9 December 1996; Internet site at **http://www.gov.nf.ca/releases/1996/edu/1209n07.htm** accessed on 1 March 2000.

[15] Michael Valpy, "Axworthy draws flak for comments on Ontario," *Globe and Mail*, 19 January 2000, A8.

[16] Reported in Michael Valpy, "Not our problem, Ottawa responds to ruling of bias," *Globe and Mail*, 04 February 2000, A8.

[17] Ibid.

[18] Michael Taube and Paul Tuns, "Creating more choices in Ontario's education system," *Hamilton Spectator*, 08 December 1999, A15.

[19] See Americans United for the Separation of Church and State, website at **http://www.au.org**.

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